

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

THOMAS A. EAMES, on behalf of
themselves and all others : CIVIL ACTION
similarly situated; ROBERTA L. :
EAMES, on behalf of themselves :
and all others similarly :
situated; TAMMY EAMES, on behalf :
of themselves and all others :
similarly situated; :

Plaintiffs, :

v :

NATIONWIDE MUTUAL INSURANCE :
COMPANY, :

Defendant. :

NO. 04-1324 (KAJ)

Wilmington, Delaware
Tuesday, September 13, 2005 at 9:30 a.m.
TELEPHONE CONFERENCE

BEFORE: HONORABLE KENT A. JORDAN, U.S.D.C.J.

APPEARANCES:

MURPHY, SPADARO & LANDON
BY: JOHN S. SPADARO, ESQ.

Counsel for Plaintiffs

SWARTZ CAMPBELL, LLC
BY: NICHOLAS E. SKILES, ESQ.

and

Brian P. Gaffigan
Registered Merit Reporter

1 APPEARANCES: (Continued)

2 SWARTZ CAMPBELL, LLC
3 BY: CURTIS P. CHEYNEY, ESQ.
4 (Philadelphia, Pennsylvania)

5 Counsel for Defendant

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8 P R O C E E D I N G S

9 (REPORTER'S NOTE: The following telephone
10 conference was held in chambers, beginning at 9:30 a.m.)

11 THE COURT: This is Judge Jordan. Who do I have
12 on the line?

13 MR. SPADARO: Your Honor, it's John Spadaro for
14 the Eames plaintiffs. Good morning.

15 MR. CHEYNEY: Curt Cheyney for Nationwide. With
16 me is Pete Oesterling, the liaison for Nationwide.

17 MR. SKILES: Also Nick Skiles on behalf of
18 Nationwide.

19 THE COURT: Mr. Oesterling, why we don't we
20 start having you tell me a little bit about yourself, if you
21 would, please.

22 MR. OESTERLING: I'm an attorney in the Office
23 of General Counsel. I've been working for Nationwide for a
24 little over 21 years. I currently head up the discovery
25 unit for the corporation. I have two lawyers and three

1 paralegals that work for me full-time and a host of
2 temporary lawyers and paralegals that we employ on an as
3 needed basis.

4 THE COURT: Tell me about your experience with
5 and knowledge of the computer systems at Nationwide since
6 the purpose of having an e-discovery liaison person is -- no
7 offense that you got a law degree, because that is great if
8 you also have the technical expertise -- but it's to have
9 somebody that knows the system. Tell me what you know about
10 the system.

11 MR. OESTERLING: I know enough about the systems
12 to I think serve as a qualified e-discovery liaison with
13 regards to the two systems that are in question here. I
14 have what I would call an e-discovery team for technical
15 questions that I can't answer with regards to the detail
16 associated with, you know, the technical aspects.

17 THE COURT: Are these people readily accessible
18 and answerable to you? In other words, we wouldn't be
19 hearing, oh, I'll have to get back to you in a week kind of
20 stuff?

21 MR. OESTERLING: No, no. No, Your Honor.
22 They're very responsive since we've been engaged in numerous
23 electronic discovery requests and have gotten our system and
24 process down pretty well given the challenges associated
25 with some of the volume that we are involved with.

1 THE COURT: You said you had numerous
2 experiences with this. Have you served in this liaison role
3 previously?

4 MR. OESTERLING: No, Your Honor. This is the
5 first opportunity that I've had to serve as an e-liaison
6 under the default standard in Delaware.

7 THE COURT: Well, I appreciate your viewing it
8 as an opportunity.

9 All right. Thank you, Mr. Oesterling.

10 Now, Mr. Spadaro, Mr. Cheyney, let's turn to you
11 folks. I got some questions for you and we're going to be
12 quick here because I have other people to help out with
13 problems they've got. So I can't spare another hour of
14 the kind of junk we went through. And I use that term
15 advisedly, I don't use it lightly or flippantly. It was the
16 sort of lack of cooperation which charitably can be called
17 "junk" that lead us to a long conversation on August 5th.

18 And, Mr. Spadaro, your letters have got some
19 heated rhetoric. I want you to answer me some specific
20 questions. First, you assert that you still know nothing
21 about how the Nationwide system works. I've read the
22 letter that was attached to Mr. Cheyney's responsive
23 correspondence, a letter from him to you dated August 22nd
24 which appears to discuss Nationwide's system and the
25 approach that they're intending to take. It's a three

1 and-a-half page single spaced document. Having read that
2 document, which I assume you did, how can you assert to me
3 you know nothing of their system and how it works?

4 MR. SPADARO: Well, Your Honor, I know what they
5 say they're going to do. I don't know how their systems
6 work. Your Honor, for example, I presented them in May
7 with search terms. An example of how my system works, my
8 little six lawyer firm system works, if you want to find a
9 description of PIP as "full," you can type in PIP within 10
10 characters of the word "full," just to take an example. Do
11 I know whether they can do that? Or what, I guess more to
12 the point, what they would be doing it on? I don't know.

13 Now, the Third Circuit in the Frazer (phonetic)
14 case. And Your Honor may have seen reference to that in the
15 papers.

16 THE COURT: I did.

17 MR. SPADARO: In the Frazer case, the Third
18 Circuit said; and not my words, the Third Circuit words;
19 that Nationwide searched it's main frame server. I asked
20 them to do that here. They told me we don't have a main
21 file server. That was their response. They didn't tell me.
22 You know, obviously there is something behind that. There
23 is maybe some qualifier to "main." I'm not that computer
24 literate. Maybe they have a network of file servers. Does
25 Your Honor know that from what we read? Do we know that

1 from what we read?

2 THE COURT: No, I know this from what you read.
3 That you are guilty of hyperbole in your expressions to the
4 Court and it's not helpful. It's an example where you folks
5 obviously can't get along because instead of saying there is
6 additional technical information that I would like to have
7 that I have asked for specifically that they decline to
8 give, and which I asked the Court to instruct them to give,
9 instead of me say "I know nothing about their system,"
10 which is flat not true because unless you don't understand
11 English, having read this letter, you understand and know
12 something about the system. It may not be everything you
13 want to know about their system.

14 What I'm telling, Mr. Spadaro, you make the
15 process more difficult, not less difficult when you write
16 letters to the Court that say "sanction them, I still know
17 nothing" and then I dig through the correspondence and the
18 attachments and I see a four-page single spaced letter, a
19 lot of which is not relevant to what you were trying to get
20 at, I grant that, but some of which is specific to "this is
21 what we think we can do and how we intend to approach a
22 search."

23 So, no, I'm not -- see, this is what is
24 important. I'm not here to engage in a discussion where you
25 justify yourself because I just don't have time for that.

1 What I have tried to express to you people is I have
2 hundreds of cases. So if the next step has to be that I
3 appoint a Special Discovery Master and it comes out of both
4 your hides, we'll do it. We'll do that.

5 MR. SPADARO: Your Honor --

6 THE COURT: Stop.

7 MR. SPADARO: Well --

8 THE COURT: Stop.

9 MR. SPADARO: I'll stop.

10 THE COURT: Thank you.

11 MR. SPADARO: I can't make a record if I stop.

12 THE COURT: I'll give you a couple minutes to
13 make your record. But if you think you are going to get an
14 abuse of discretion ruling out of the Third Circuit because
15 I'm not letting you keep burning time on this, you're
16 welcome to try. You're welcome to try. But I just don't
17 have time to give you an hour today for you to make another
18 record.

19 What I'm telling you is having read the
20 correspondence, I understand you are not getting everything
21 you think you want, but you are not helping the process,
22 because you are overstating your case and you are saying
23 things which frankly I think a fair reading will demonstrate
24 are inaccurate. To say "it's been months, I still know
25 nothing of their system," in light of the letter, is just --

1 maybe we're working around a semantic issue here. When you
2 say "system," you mean "I want the technical specs and they
3 haven't given them." When I read that in the context in
4 which you gave it to me and a demand for sanctions, it was
5 their thumbing -- literally, you said "They're thumbing
6 their nose at the Court. They haven't given a single
7 document. They still won't talk to me about their system."
8 That is not an accurate picture. You guys still aren't
9 getting along well but to say that they haven't done
10 anything is just flat inaccurate.

11 So now, that's my record for you. I expect
12 better out of you, just like I expect better out of the
13 other side. You quoted at length to me the verbal spanking
14 I gave to the other side about being cooperative in
15 discovery. You can consider this your own version of that.
16 I expect no hyperbole and scrupulous accuracy if you want
17 me to step in and help you with issues. Don't overplay your
18 hand; which you did this time, to a very large extent.

19 Now, in the interest of your making a record,
20 here is your couple minutes. Say what you need to say, get
21 it on the record and then we can move on to substance.

22 MR. SPADARO: Well, Your Honor, I'm not sure
23 exactly how to proceed. After the last teleconference,
24 within hours of the teleconference, we could read into the
25 record the message I sent within hours. It is restrained,

1 it is professional. I extended everything I had done in
2 this case, Your Honor, and the response the same day is "we
3 don't expect we're going to find anything. We're not going
4 to. We don't think we have to meet with you. We don't
5 think our e-discovery liaison has to meet with you." That
6 is the response of August 5th from Mr. Cheyney and "maybe
7 Mr. Muncie has their documents" and I think everyone on the
8 calls knows what that's means. "Maybe Mr. Muncie has the
9 documents."

10 THE COURT: Look --

11 MR. SPADARO: The Court doesn't want to hear it.

12 THE COURT: It's in the record. You said you
13 needed to make a record. That is in the record. Your view
14 on it is in the record.

15 MR. SPADARO: Default standards, Your Honor,
16 have a specific requirement as to what they're supposed to
17 do to educate me.

18 THE COURT: Right.

19 MR. SPADARO: It's true I know they have
20 computers. I don't know what kind of search was done in
21 Frazer. Gee, we've got a model from another case where they
22 actually did a search of the file server. They deny they
23 even have the equipment that Frazer says. I don't know
24 how they're going to do searches. I don't know if they
25 can perform Boolean searches. I don't know where corporate

1 level management documents are stored. I'm not talking
2 about e-mails that have been -- yes, I know that they're
3 going to search e-mails from last week and they're going
4 to limit it to people who are connected to Delaware. That
5 search is calculated to fail. It has almost no chance of
6 discovering the documents that we're looking for.

7 THE COURT: Now, stop. I read that in your
8 letter. Then I read their response which said we're not
9 limiting this geographically. You said they're limiting to
10 people in Delaware. They said expressly we're not doing
11 that. Where is the disconnect? How come you think they're
12 doing it when they said in correspondence back to you on
13 September 8th we're not doing that? And I assume they'll
14 reiterate that on the call. I don't know. Mr. Cheyney, are
15 you limiting this?

16 MR. CHEYNEY: No, Your Honor.

17 THE COURT: Okay. Mr. Spadaro, why do you
18 believe they're doing it when they say they're not going to
19 do it?

20 MR. SPADARO: Well, Your Honor, if you look at
21 the list of custodians they have given us, 90 percent of
22 that list are agents, insurance agents. And I recognize
23 the names: Broadbent, Muncie, Deaton, Truitt. These are
24 insurance agents that we subpoenaed in this case. They're
25 Delaware insurance agents. That's a list. That list

1 consists mostly of Delaware insurance agents. It's about 70
2 people on that list.

3 THE COURT: Did you pick the phone up and speak
4 to Mr. Cheyney and say "This is why I'm concerned? That
5 there's a limitation to Delaware and can you allay my
6 concern?" Did you have a conversation like that?

7 MR. SPADARO: Your Honor, this is why the
8 Exhibit B, as painful as it is, needs to be read from start
9 to finish. It's in there more than once where you're
10 searching Delaware agents and I expect the other 20 people
11 on that list are probably people with some sort of regional
12 responsibility for Delaware and they never decided that,
13 they never confirmed that. This is the state of mind
14 ignorance.

15 Your Honor challenged me to say, to prove that
16 the point that they're making is wrong. I don't know
17 enough. But I know enough to say that the agents -- and,
18 you know, the duplicity is on two levels here. Your Honor
19 may or may not recall because so much has transpired that
20 when they made their initial discovery disclosures, I
21 complained that the documents themselves, the documents
22 created and shared with the consumers in Delaware should
23 come not from the agents, that we shouldn't be put to the
24 expense of multiple subpoenas of nonparties because they
25 have possession, custody and control of their agents'

1 documents.

2 Now they're using Delaware agents to limit the
3 search to Delaware, and there is no way we're going to get
4 the documents that way. And, suddenly, they do have control
5 over the agents' documents. And not only that, they're
6 presenting the documents as their documents. That is
7 absolutely sanctionable. I've been doing it for 20 years
8 and that is sanctionable conduct. That is completely being
9 obscured I think by the process here.

10 THE COURT: The process being that you have
11 to do what? That you have to discuss their issues, the
12 problems you are having with them?

13 MR. SPADARO: Well, Your Honor, to me, the
14 process is one in which every call is a referendum on me
15 personally.

16 THE COURT: No.

17 MR. SPADARO: And, well, that has been my
18 experience, Your Honor. And if you go back the transcripts
19 of earlier calls, I think I have shown objectively that they
20 were not responding to me. Mr. Oesterling just said with a
21 straight face these aren't people that say I'll get back to
22 you in a week and yet you see if you read these e-mails, you
23 know Mr. Cheyney says "I'll get back to you next Wednesday."
24 Next Wednesday comes and goes, a week passes. "You said you
25 were going to get back to me next Wednesday." "No, I did

1 never said that." I write to him, you still haven't gotten
2 back to me. I'm chasing them, chasing them. It's more of
3 the same. Now, once I said, "look, I'm going to get the
4 judge on the phone," things began to change somewhat and
5 they began to put a prettier face on things. And I think
6 the Court -- it sounds me as though the Court has bought
7 into it, and we despair of the process at this point if that
8 is the case because I do not know, I do not know -- I know
9 they're going to go to e-mails for their agents. Those are
10 not their systems. I know nothing about their systems.

11 And, Your Honor, Your Honor has told me that
12 that is a misrepresentation. I don't know what to do. I
13 haven't been in this situation before where I know what I'm
14 saying is true objectively and I can't persuade the Court of
15 it and. But I am as ignorant of their systems, their
16 internal systems where the documents are that we want and
17 who might have them as anyone in the parking lot outside my
18 office window right now.

19 THE COURT: Have you spoken to Mr. Oesterling?

20 MR. SPADARO: I asked repeatedly to meet with
21 Mr. Oesterling. If Your Honor read Exhibit B, you will see
22 their first reaction was "You don't get an audience. Show
23 me," Mr. Cheyney's says on August 5th, within hours of
24 speaking with Your Honor, within hours.

25 THE COURT: I read it. I did read it. I read

1 where he said "I see no requirement for that." I'm asking
2 you, did you say, "look, I want to speak to the man" and
3 they said "no, you don't get to?"

4 MR. SPADARO: That was their response. When I
5 first asked to meet with them later on, I asked for an
6 in-person meeting with this attendance. Again, I proposed
7 four days. He said they were unavailable on each four dates
8 on the month of September. Then I told them "I'm calling
9 the judge. Are you available on September 13th or 14th?"
10 Then, and only then, they came back and said "Guess what?
11 Mr. Oesterling is going to meet with you." And now we have
12 a meeting scheduled for the end of September, almost 60 days
13 out from the August 5th teleconference. But I don't want to
14 continue with process. I want to get the documents. But
15 this is not -- we are not moving to a place where I get the
16 documents. And that is not fair. Because discovery is,
17 Your Honor knows the purpose of civil discovery. That's
18 where we're moving. We're moving to a place where they come
19 back and said "We did our search. We didn't find anything"
20 because they're going to ask.

21 THE COURT: Now, see, stop. You say that is
22 where we're moving. That is the problem with what is
23 happening in this case. You're so convinced that they're
24 bad actors, your experience either in the course of this
25 case or previous case was Mr. Cheyney or both has persuaded

1 you that -- and I'll use your own words. You've accused
2 them of duplicity, which is a fancy way of saying they're
3 liars. "Judge, these people are liars." So, stop. So
4 that's where your mind is at. And you know what? At the
5 end of it, it may turn out that you're right. That's an
6 explosive charge but it's not one that you can expect the
7 Court to buy into.

8 So when you say objectively "I don't know what
9 to do, I can't persuade the Court, you've bought into it,"
10 I'm reading a record here. I'm reading a record where you
11 demand things and they write back to you and say "we're not
12 giving you this. What do you think about that?" And you
13 write back and say "I already told you about that and this
14 the other thing I want."

15 It's true this isn't working smoothly. Heck,
16 it's so far from being what it ought to be that it really is
17 virtually totally a breakdown, which is why I said I'm
18 inclined to, for no other reason than I can't spend all my
19 time with sorting out stuff for you people, to get a Special
20 Discovery Master in who has technical expertise. You will
21 both pay for it, at least in the first instance. I'll ask
22 that person if they can find any reason for me to believe
23 one side or the other is more at fault. And if I think
24 there is, I'll make adjustments to it.

25 But you want me to go immediately to sanctions.

1 And what I'm having a problem with, and I'm going to have to
2 give Mr. Cheyney an opportunity to speak here for a couple
3 minutes, is you've taken the step of saying "I know where
4 this is going. I know where it's headed." And I can't take
5 that approach. I'm a judge, Mr. Spadaro. I have to wait
6 until things actually play out and I can see how people
7 behave. I'm not allowed to be Karnac, put the discovery
8 letters to my forehead and say what the answer is before I
9 look at them or see what is the appropriate response, i.e.,
10 sanctions or not, until people have a chance to perform. In
11 your view, they've had their chances, they've burned their
12 bridges, et cetera. I look at this record, and that's not
13 true. After August 5th, did things move as they should
14 have? No. Was there movement? Yes.

15 All right.

16 MR. SPADARO: Your Honor, can I just make two
17 quick points.

18 THE COURT: Yes.

19 MR. SPADARO: Because I did use the word
20 duplicity.

21 THE COURT: You used the word duplicity.

22 MR. SPADARO: I did, and this is why. You just
23 asked Mr. Cheyney point blank, "are you limiting anything to
24 Delaware?" He said "no." If you look at the August 22nd
25 letter. I know it's a collection and argument date.

1 August 22, 2005 letter from Mr. Cheyney. I'll check to see
2 if it's an exhibit. Yes, it's Exhibit C to their papers so
3 maybe it's easier to find it that way. If you turn to page
4 2, and if you look at the first full paragraph, there in the
5 middle of the page, they tell us, item number 3 in that
6 paragraph, "Nationwide will first search Delaware state
7 e-mail files and Nationwide Mutual Insurance Company board
8 minutes."

9 Now, the board minutes search is helpful and
10 it's generic. It's not Delaware specific. All right. But
11 the board minute search you're talking about, Your Honor
12 know how boards work. Boards do not get into minutia,
13 generally. Boards go on the periphery issues from issue to
14 issue. When you want, you're in litigation and you want
15 the minutia, you have to go to the management and middle
16 management and sometimes beneath that. So I wanted a search
17 of board minutes because it might be there but board minutes
18 are not really the heart of our search attempts. From our
19 perspective, they've never been.

20 It says right here they're going to search
21 Delaware state e-mail files. That is what I know about
22 their system. I have e-mail files and, of course, I knew
23 they had e-mail files because that's a modern corporation.
24 They're a \$115 billion corporation operating in the 21st
25 Century. So it's incorrect to say I know nothing about

1 their systems in that sense. I know they had e-mails before
2 I sued them, Your Honor. But they're limiting to Delaware,
3 and the list, the list of people they give me as custodians
4 is made up almost entirely of Delaware insurance agents who,
5 according to them, are not even Nationwide. And, you know,
6 we go back and forth.

7 You talk about duplicity. I can prove, if I get
8 the transcript, that earlier they said "We don't have
9 possession, custody and control of the Delaware agents
10 documents."

11 THE COURT: Okay.

12 MR. SPADARO: Now they're their own custodians.

13 THE COURT: All right. Mr. Cheyney, you've got
14 a few minutes if there is anything you think you need to put
15 on the record on this call, and then I have --

16 MR. CHEYNEY: I understand, Your Honor. I want
17 to really yield to Mr. Oesterling because we've done a great
18 deal. First, to say we took your admonitions seriously.
19 We have been working steadily. We have not been trying to
20 obscure or do anything. The issue of Frazer is a non
21 sequitur. That was a main server for the AOL system, agents
22 only, not for the company. And we were looking for a
23 specific document that we, new by header, date, author,
24 title, title header and what it was about. That is not
25 what we have here. There is no main server that covers the

1 company at all. Different parameters, different search
2 operations. We have no way of looking for a day, a time, a
3 title. There is no genesis document. There is no generic
4 document by subject or description.

5 We are searching Delaware first. And we did not
6 say our agents, capital A, "Agents" are our employees and
7 their documents are their documents. They're independent
8 contractors. This is a three court case. The United States
9 says they're independent contractors. Yes, we have access
10 to their electronic system when they're on us and lease
11 their system from us but we're not just limiting our search
12 to Delaware. We don't intend to limit our search for
13 Delaware but to start at Delaware first.

14 Now, can I please ask Mr. Oesterling to tell us
15 what we have done to show you what we have done to try to
16 deal with your admonitions and to cooperate as best we can?

17 THE COURT: Yes.

18 MR. CHEYNEY: Can he give a couple minutes?

19 THE COURT: Yes, over a couple minutes. Yes.

20 MR. OESTERLING: Yes, Your Honor. We were
21 requested to search 148 mail files. Of those 148, we've
22 completed 116. Out of those 116, we've collected in excess
23 of 80,000 potentially responsive e-mails. Now, this would
24 be e-mails that contained the search words that were agreed
25 upon by the parties.

1 THE COURT: Let me ask you, Mr. Oesterling, have
2 you met with Mr. Spadaro or had any conversation with him?
3 Has he heard your voice before today?

4 MR. OESTERLING: No, he hasn't, Your Honor.

5 THE COURT: Okay.

6 MR. CHEYNEY: If I could interrupt, Pete.

7 We do have an agreement to meet on the 20th,
8 whatever day it was. And the date I agreed was the date I
9 said Pete would come back from vacation. That is why we
10 called and got a date, not because I was afraid of this
11 conference. And my earlier letter says when he returns on
12 the first of this week, we will give you some dates. And we
13 did, not in fear but in cooperation.

14 Please go on, Pete.

15 THE COURT: Well, I'm taking it as a given you
16 are doing things. I can see it from the correspondence.

17 MR. CHEYNEY: We completely searched the board
18 minutes, and the last thing we found it even mentioned PIP
19 was a Texas PIP in 1993. It has nothing to do with these
20 issues nothing to do with it whatsoever. We have searched
21 over the board minutes of the corporation, the state level
22 minutes which were where there is officers of the
23 corporation that relate with the agents and we started the
24 agent search. We've done a great deal.

25 THE COURT: All right. Well, certainly

1 Mr. Spadaro, who could speak for himself if we had time but
2 we don't, would say that is because you are looking in the
3 wrong place.

4 So here is what is going to happen. You guys
5 are going to have this meeting. And, of course, I hope it's
6 not too much to expect that it will be thoroughly
7 professional, that everybody will be under control, that
8 there won't be any table pounding or finger pointing or
9 sarcasm or anything else and that there will be an open
10 discussion of the Nationwide computer system. If it needs
11 to be done under a protective order, we've got one, I think.

12 MR. CHEYNEY: We submitted one back to him that
13 said it was acceptable to us. He then said he had some
14 issues with our reply.

15 MR. OESTERLING: Well, and if I could interject?
16 The Nationwide system, we're talking hundreds of databases.
17 Now, what we're trying to zero in on is what system or
18 systems could potentially have relevant evidence.

19 THE COURT: What I'm telling you folks on the
20 Nationwide side is it's not good enough for you to say to
21 me this is what we've done. The way to cut this issue off,
22 which I am insisting you do, is to explain to Mr. Spadaro
23 what the Nationwide system is like. Have the technical
24 people in the room, if you have to, Mr. Oesterling. Don't
25 have a meeting where he's got questions without having the

1 people there who can answer him. Have a discussion about
2 the system. All right? Because I don't want to keep
3 talking to you guys about "they're setting it up to fail,
4 this that and the other. If you only listen to me, you will
5 see that they're lying sacks." And I don't want to hear
6 from you "that's not true, that's not true." What I want
7 is for him to be able to say "I found out this and that
8 and the other thing about this system and we came to some
9 resolution" or I want you to be able to say, "judge, we
10 gave -- we had an X-hour conversation in which we laid out
11 the entirety of our documents storage and retrieval system
12 and asked him and made proposals about how to go forward,
13 and he made counterproposals and this is why it was
14 reasonable or wasn't reasonable" because then I'm in a
15 position to say "is cost shifting appropriate?"

16 Right now, I can't do that because while I
17 disagree flatly, as I've said in this call, with the
18 hyperbole of Mr. Spadaro's letter that nothing has happened
19 or he knows nothing, I agree with him that we're a month
20 plus after the last call and still there is an inadequate
21 degree of cooperation and conversation so that we can get
22 past the issue of e-discovery into the discovery process
23 itself in a way that includes the plaintiff meaningfully.

24 So you guys have your meeting as described, but
25 do you understand both sides what I'm telling you to do?

1 Mr. Spadaro, do you understand?

2 MR. SPADARO: I do, Your Honor. I do have one
3 very brief application I'd like to make, if the Court will
4 permit it. I think it will help.

5 THE COURT: Go ahead.

6 MR. SPADARO: Well, Your Honor, my application
7 is that the Court order them now to make a good faith effort
8 to identify persons with knowledge of the practice and its
9 genesis. And by the practice, I'm not going to use loaded
10 word they're not going to agree with. We all agree and we
11 stipulated at the deposition of the agents so that we could
12 avoid deposing the next three agents. That the vast
13 majority of documents that the agents produced characterize
14 PIP as full. They say "the characterization is innocent,
15 it's this." I say "it's not innocent, it means that."

16 But when you look at three documents, the
17 characterization and in the memorandum of insurance, and the
18 rate quote documents, these columnar documents that list the
19 type of coverage, the amount of coverage and often list a
20 premium amount for each, we say they're declarations pages,
21 they say they're not and so forth, but there is no question
22 whenever they purport to sell the minimum limit that in
23 those type of documents, PIP is characterized as "full,"
24 and all the agents are doing it and they're not doing it by
25 accident and they've been doing it for years. Somebody told

1 them to do it so I'd like a good faith effort to identify
2 people of the knowledge of the genesis of that practice. If
3 we find those people, we'll find the documents.

4 THE COURT: Mr. Spadaro.

5 MR. SPADARO: Sure.

6 THE COURT: I saw that in your correspondence.
7 I know that is something you would like. And you know what?
8 That might be a perfectly reasonable request. If you
9 haven't propounded it formally, you should propound it
10 formally. But I don't have time to address it today, not
11 even to get a response. I have another group of lawyers who
12 have another discovery dispute and I have to turn to them.

13 Here is the last thing I'm telling you to do. I
14 want both sides to identify to me and report back to me on a
15 knowledgeable party who I can turn to as a technical expert
16 perhaps in e-discovery to help me sort out your issues if
17 you keep having problems and who could be a Special
18 Discovery Master if I had to pull somebody in here. You
19 both --

20 MR. SPADARO: You mean two people or single?

21 THE COURT: I'm talking about if it can be one
22 person, that's the best, but I'm talking about you folks
23 identifying somebody because --

24 MR. SPADARO: I understand.

25 THE COURT: -- this is not productive. It's not

1 helpful. You've guys have spent I don't know how much time
2 and money writing me letters, saying how unreasonable the
3 other side is. I mean I'm not unsympathetic to you,
4 Mr. Spadaro. You say "it turns into a referendum on me."
5 That's now how you view this but I have to say candidly on
6 this record you are so wrapped up in the emotion of this
7 case, it's just screaming at me over the phone. The heat
8 waves are coming off the receiver at this end. Both sides.
9 The sarcasm is evident in spots in the correspondence from
10 the other side. Your intensity is evident.

11 You folks have got to get your emotions under
12 control. And I can't be the one who is holding your hand
13 through this. I have got too many other people with
14 legitimate complaints and disputes that I can't have your
15 issues swamp me on a monthly basis for time to read your
16 letters, digest your problem, which I do, and then get on
17 the phone with you and try to sort it out.

18 So both sides, I want a discussion from you
19 about who would be a good neutral if this happens again,
20 because if it happens, this is the last free bite. Next
21 time, we're going and I'm bringing somebody into the mix.
22 And in the first instance, we'll be splitting it 50/50 but
23 I'm going to be asking that person "who is a bad actor
24 here?" And if they say "you know what? I think Nationwide
25 really is jerking them around," you are going to pay the

1 full freight; not 75 percent, the whole wad.

2 Does everybody understand what I'm trying to get
3 across to you? Mr. Cheyney?

4 MR. CHEYNEY: Yes, Your Honor.

5 THE COURT: Okay. Mr. Oesterling, I'm glad to
6 have you in the mix. I know you are in-house with
7 Nationwide but I'm hoping against hope that you will be a
8 force for reason in the course of these discussions.

9 MR. OESTERLING: Your Honor, if I could make a
10 suggestion to make our meeting more productive? If there
11 are specific questions, technical questions that I might
12 not be able to answer in a face-to-face, I could do some
13 research prior to our meeting to make sure that it is
14 productive.

15 THE COURT: Okay. Well, that's a great idea.
16 And, Mr. Spadaro, you let them him know that.

17 And here is my last piece of advice for you
18 before I hang up because I've got people on hold. I expect
19 there to be more phone calls; more phone calls and fewer
20 e-mails. Pick the phone up and speak to each other. If you
21 need to make a record in e-mail afterwards that you feel
22 they're so completely absent any trust, then you write your
23 confirming e-mail, but pick the phone up and speak to each
24 other, okay? I think at least 75 percent of your problem is
25 you are so busy each side making a record that you are not

1 even trying to communicate. You're only trying to build a
2 record to come to me and that is not helpful.

3 All right. That's it for this call. I'll look
4 to see from you folks within two weeks your suggestion after
5 good faith discussions on this about who a fair neutral
6 would be with the expertise to help us sort this out if you
7 folks can't give your act together.

8 (The attorneys respond, "Thank you, Your
9 Honor.")

10 THE COURT: Good-bye.

11 (Telephone conference ends at 10:07 a.m.)
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